IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
Charleston

WILLIAM EDWARD REBROOK III,

Petitioner,

v. Case No. 2:93-cr-00151

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF IN OPPOSITION TO UNITED STATES' RESPONSE

I.

Introduction

In *Skilling v. United States*, 561 U.S. ____, 2010 WL 2518587, 2010 U.S. LEXIS 5259 (2010), the United States Supreme Court held the honest services wire fraud theory, under 18 U.S.C. §1346, which was the basis for Mr. Skilling's conviction, was unconstitutionally vague. The United States Supreme Court further held to sustain a wire fraud conviction under 18 U.S.C. §1346, there must be proof of bribes or kickbacks. As a result of this holding, although Petitioner William Edward ReBrook, III, was convicted of honest services wire fraud in 1993, and this conviction was affirmed by the Fourth Circuit Court of Appeals in 1995, Petitioner is actually innocent of wire fraud because it is undisputed the United States did not present any evidence of bribes or kickbacks. Thus, under these compelling circumstances, the only remedy available to Petitioner to achieve justice is through the issuance of a writ of coram nobis. *United States v. Morgan*, 346 U.S. 502, 512,74 S.Ct. 247, 253, 98 L.Ed. 248, 257 (1954); *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988).

Despite the lack of any factual or legal foundation to support Petitioner's honest services wire fraud conviction, the United States asks the Court to deny Petitioner's request for coram nobis relief for procedural and substantive reasons. Procedurally, the United States asserts the vagueness argument, which caused the United States Supreme Court to conclude that honest services wire fraud theory was unconstitutional, was not raised by Petitioner in the underlying appeal to the Fourth Circuit. Substantively, the United States argues Petitioner's wire fraud conviction not only was based upon the honest services theory, but also on a separate property theory unaffected by the holding in *Skilling*.

On the procedural issue, Petitioner respectfully submits the validity of the honest services wire fraud count was, in fact, developed and argued at the trial court level, as evidenced by the District Court's decisions in *United States v. ReBrook*, 837 F.Supp. 162 (S.D.W.Va. 1993), and *United States v. ReBrook*, 842 F.Supp. 891 (S.D.W.Va. 1994). Furthermore, the Fourth Circuit has rejected similar procedural default arguments in other coram nobis decisions where, as in the present case, the petitioner continues to suffer from the consequences of an invalid conviction and is actually innocent of the crime, rendering the error of such a fundamental character that coram nobis relief is required.

On the substantive issue, Petitioner respectfully submits his case was presented to the jury only on the honest services wire fraud theory, the jury was instructed only on the honest services wire fraud theory, the two District Court decisions only discussed the honest services wire fraud theory, and the Fourth Circuit affirmed Petitioner's conviction only on the honest services wire fraud theory. The suggestion by the United States that somehow the jury had the right to find Petitioner guilty of wire fraud, based upon a theory never asserted by the United States nor included in the jury's instructions or mentioned by the Fourth Circuit in affirming Petitioner's conviction, is an attempt by the United States to rewrite the facts of this case in a manner that is inconsistent with the jury's actual verdict. For these reasons, and for the reasons stated in more detail below, Petitioner respectfully moves the Court to grant the writ of coram nobis requested in this case.

II.

Petitioner properly and timely has complied with the procedural requirements for seeking a writ of coram nobis

The United States asserts coram nobis relief is not appropriate in this case because Petitioner failed to raise the vagueness issue in his appeal to the Fourth Circuit. The change in the law established by *Skilling* has been found to be so significant that the Third Circuit in *United States v. James*, 2010 U.S.App.LEXIS 19310 (2010), retroactively applied this holding in a case where the defendant had failed to raise a vagueness argument at trial. In *James*, the defendant's trial had concluded prior to *Skilling* being decided. In fact, *Skilling* was not published until after this appeal was argued. In applying the plain error standard under these facts and finding this error was not harmless, the Third Circuit, 2010 U.S.App.LEXIS 19310 at *22-23, concluded:

> "We have held previously that affirming a conviction where the government has failed to prove each essential element of the crime beyond a reasonable doubt affect[s] substantial rights, and seriously impugns the fairness, integrity and public reputation of judicial proceedings." *United States v. Jones*, 471 F.3d 478, 480 (3rd Cir. 2006)(quotation marks and citations omitted)....In the context of this case, where the fraudulent act is the non-disclosure of a conflict of interest, it would demean the judicial process to attempt to put the genie back in the bottle by essentially rewriting the charge to the jury on Count 5 and assuming the jury made distinctions the Government did not bring out in its summation.

In the present case, Petitioner clearly challenged the constitutionality of the honest services wire fraud count prior to trial. In *United States v. ReBrook*, 837 F.Supp. 162, 169-70 (S.D.W.Va. 1993), the District Court noted Petitioner challenged "on vagueness grounds the `honest services' standard set forth in 18 U.S.C. §1346, because he has not `been able to find any definition or designation of specific acts which would constitute a violation of the general duty of loyalty, honesty, independence, impartiality and integrity.'" The District Court was dismissive of this argument and concluded, "Courts have convicted defendants for depriving government of honest services for hundreds of years." 837 F.Supp. at 171. The District Court reaffirmed this ruling after Petitioner was convicted of one count of honest services wire fraud and one count of securities fraud. *United States v. ReBrook*, 842 F.Supp. 891 (S.D.W.Va. 1994).

On appeal, Petitioner argued the securities fraud and wire fraud convictions were so intertwined that the insufficiency of the evidence on the securities fraud claim necessarily required the reversal of the wire fraud claim as well. However, the Fourth Circuit in *United States v. ReBrook*, 58 F.3d 961 (4th Cir. 1995), concluded that while the securities fraud conviction had to be vacated because the Fourth Circuit rejected the misappropriation theory,[1] the honest services wire fraud conviction could be and was affirmed. Thus, the Fourth Circuit did not address the constitutionality of Petitioner's honest services wire fraud conviction because this specific issue was not raised in the appeal.

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[1]On page 5 of its brief, the United States notes that in 1997, two years **after** the Fourth Circuit set aside Petitioner's securities fraud conviction and affirmed the honest services wire fraud conviction, the United States Supreme Court issued its decision in *United States v. O'Hagan*, 521 U.S. 642 (1997). In *O'Hagan*, the misappropriation securities fraud theory was adopted. This change in the law, criminalizing conduct previously held by the Fourth Circuit as well as many other courts as not being criminal, has no relevance or application in this coram nobis proceeding. Any suggestion that the Court somehow should apply *O'Hagan* to Petitioner in this proceeding must be summarily rejected. The only conviction at issue in this proceeding is the honest services wire fraud conviction affirmed by the Fourth Circuit.

Under these circumstances, the United States argues Petitioner should not be permitted to obtain coram nobis relief, based upon the *Skilling* decision, because Petitioner did not anticipate the holding in *Skilling* by asserting the vagueness theory in the appeal. The United States acknowledges the Fourth Circuit has not decided a case specifically holding what procedural prerequisites must be met before coram nobis relief is available.

Petitioner respectfully submits a review of Fourth Circuit case law demonstrates in these coram nobis decisions, the Fourth Circuit has been more concerned with addressing the fundamental unfairness of a person remaining convicted of a crime when, under the law as expressed in a more recent decision, the person is actually innocent of the crime.

For example, in *Mandel*, 862 F.2d at 1074, the Fourth Circuit, after analyzing the retroactive application of *McNally* to the defendants who filed for coram nobis relief, noted, "it is clear to us that if this case were before us on direct appeal we would be required to overturn all the convictions." Applying that same standard in the present case, the Fourth Circuit would be required, under *Skilling*, to reverse Petitioner's honest services wire fraud conviction if this case were on direct appeal at this time. In summarizing the standard which must be met to warrant coram nobis relief, the Fourth Circuit concluded, "An error `of the most fundamental character' must have occurred to warrant issuing the writ, and no other remedy may be available." 862 F.2d at 1075. A decision holding that certain actions do not meet the elements of a particular crime is about as fundamental an issue as can be raised in a criminal case.

The Fourth Circuit has recognized the availability of coram nobis relief, without imposing any particular procedural requirement. In *United States v. Hoffman*, 1991 U.S.App.LEXIS 3734 (4th Cir. 1991)(Unpublished), the petitioner had been convicted of seven counts of mail fraud and seven counts of making false statements. After *McNally*, this petitioner filed a writ of coram nobis **even though he had never filed any appeal from the underlying conviction.** The District Court granted the writ of coram nobis as to the mail fraud counts, based upon the holding in *McNally*, but denied any relief on the remaining false statement convictions. The Fourth Circuit affirmed the lower court's decision under facts where clearly the *McNally* issue had never previously been presented on appeal.

In a much earlier coram nobis decision, *Mathis v. United States*, 369 F.2d 43 (4th Cir. 1966), the petitioner had pleaded guilty to a crime without counsel and without being advised of his right to have counsel appointed for him, as required by Rule 44 of the Federal Rules of Criminal Procedure. This petitioner, who was serving a state sentence subject to a federal detainer arising from this guilty plea, filed for coram nobis relief, even though arguably he presently was not suffering any prejudice from the federal conviction, which sentence he had not yet begun to serve.

Mathis recognizes that coram nobis relief is broader than earlier cases had suggested and has been applied in situations where the petitioner was not suffering from any present adverse effect arising from the conviction. In granting coram nobis relief, the Fourth Circuit once again noted this writ was designed "'to achieve justice.'" Once again, coram nobis relief was granted where no appeal had been filed from the initial federal court conviction. 369 F.2d at 49.

In *United States v. Shamy*, 886 F.2d 743 (4th Cir. 1989), a petitioner, who had been convicted of mail fraud, wire fraud, and racketeering, sought coram nobis relief, based upon *McNally* and *Mandel*. The United States in *Shamy* asserted that coram nobis relief should not be granted because at trial, Mr. Shamy had failed to seek an instruction consistent with *McNally*. The United States argued that such an instruction had been requested and denied in *Mandel*, which preserved the issue for coram nobis relief.

In rejecting this procedural argument, the Fourth Circuit held:

> With one exception, all of the essential facts in this case are indistinguishable from those of *Mandel*. In this case, Shamy did not request a jury instruction consistent with *McNally*. We view this as a matter of insufficient consequence to bar the issuance of the writ. *Ingber v. Enzor*, 841 F.2d 450 (2nd Cir. 1988); *see also Ross v. Reed*, 704 F.2d 705, 708-09 (4th Cir. 1983), *aff'd.* 468 U.S. 1, 82 L.Ed.2d 1, 104 S.Ct. 2901 (1984).

In *Ingber*, 841 F.2d at 454-55, cited as authority for the holding in *Shamy*, the Second Circuit explained why it refused to procedurally default those petitioners who failed to anticipate the holding in *McNally*:

> A defendant may be denied the benefit of a new rule of law on collateral attack of his conviction if the rule is announced, and he fails to raise it, before his direct appeals are exhausted. *See Davis, 417 U.S. at 345*. **However, this court has taken a different approach to retroactivity when the new rule is handed down after the time for direct appeal has expired.** In *United States v. Loschiavo,* 531 F.2d 659 (2d Cir. 1976), we held that *United States v. Del Toro,* 513 F.2d 656 (2d Cir.), *cert. denied,* 423 U.S. 826, 96 S. Ct. 41, 46 L. Ed. 2d 42 (1975), which altered the definition of "public official" *under 18 U.S.C. § 201(b)* and reversed a conviction for bribing an employee of the City of New York, should be applied retroactively to Loschiavo's conviction under the statute for bribing the same New York City employee. *Id.* at 665-66. Similarly, in *United States v. Liguori,* 438 F.2d 663 (2d Cir. 1971), on petition for relief under *section 2255*, we vacated the petitioners' drug convictions in light of the Supreme Court's decisions in *Leary v. United States,* 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969), and *Turner v. United States,* 396 U.S. 398, 24 L. Ed. 2d 610, 90 S. Ct. 642 (1970), which invalidated statutory presumptions that had permitted convictions of the *Liguori* petitioners without the introduction of direct evidence. *Id.* at 669-70. Both *Liguori* and *Loschiavo* involved changes in substantive law unavailable to the petitioners on direct appeal. *See Loschiavo,* 531 F.2d at 665; *Liguori,* 438 F.2d at 665. We therefore declined to impose an exhaustion requirement in those cases and entertained the petitions despite the fact that an argument anticipating the new rule was not made on direct appeal in *Liguori,* 438 F.2d at 665, and was presented for the first time in a petition for certiorari in *Loschiavo,* 531 F.2d at 664-65.

> **Although Ingber failed to raise his present challenge on appeal or in a petition for writ of certiorari, retroactive application is necessary to avoid an unfair result.** As noted above, this circuit formerly considered deprivation of the right to honest government to be within the scope of 18 U.S.C. § 1341. *See Margiotta,* 688 F.2d at 120-21. The *Margiotta* decision was but one in a series of Second Circuit decisions expanding the scope of *section 1341*. The steady expansion by this and other circuits of the mail and wire fraud statutes continued for more than a decade, unaddressed by the Supreme Court. *See, e.g., United States v. Newman,* 664 F.2d 12 (2d Cir. 1981); *United States v. Bronston,* 658 F.2d 920 (2d Cir. 1981), *cert. denied*, 456 U.S. 915, 72 L. Ed. 2d 174, 102 S. Ct. 1769 (1982); *United States v. Von Barta,* 635 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 998, 68 L. Ed. 2d 199, 101 S. Ct. 1703 (1981); *United States v. Bohonus,* 628 F.2d 1167 (9th Cir.), *cert. denied*, 447 U.S. 928, 65 L. Ed. 2d 1122, 100 S. Ct. 3026 (1980); *United States v. Condolon,* 600 F.2d 7 (4th Cir. 1979); *United States v. Bush,* 522 F.2d 641 (7th Cir. 1975), *cert. denied*, 424 U.S. 977, 47 L. Ed. 2d 748, 96 S. Ct. 1484 (1976); *United States v. States,* 488 F.2d 761 (8th Cir. 1973), *cert. denied*, 417 U.S. 909, 94 S. Ct. 2605, 41 L. Ed. 2d 212 (1974). Ingber's time to file a petition for a writ of certiorari expired well before the Supreme Court overturned these precedents in *McNally*. **Were we to penalize Ingber for failing to challenge such entrenched precedent, we would ascribe to attorneys and their clients the power to prognosticate with greater precision than the judges of this court. Such a rule would encourage appeal of even well-settled points of law. We see no value in imposing a responsibility to pursue such a "patently futile" course. *See Liguori,* 438 F.2d at 665. Moreover, as we observed in an analogous context in *Loschiavo*: "To say that in such circumstances the system of justice can provide no remedy because of a court-made rule that failure to take a direct appeal on the specific issue bars all later motions for collateral attack... indicates a lack of due process in the judicial system." *Loschiavo,* 531 F.2d at 666.** (Emphasis added).

Similarly, the Fourth Circuit in *Ross*, 704 F.2d at 708-09, also cited in *Shamy*, discussed whether a defendant convicted in state court, who had failed to object to instructions placing the burden of proving self-defense on the defendant, should be barred procedurally from raising that issue in a habeas corpus action after the United States Supreme Court issued its decision in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970):

> The Supreme Court in *Engle* was concerned with the consequence of procedural defaults during trial proceedings, and its reluctance to declare that novelty of the legal principle could never constitute cause for failure to object was made in the context of concern about the burden such a rule would impose upon trial lawyers and trial courts. The default here occurred in the appellate process. But if novelty is never cause for failure to raise the contention on appeal, the burden placed upon lawyers and appellate courts would be heavy. If novelty were never cause, counsel on appeal would be obligated to raise and argue every conceivable constitutional claim, no matter how far fetched, in order to preserve a right for post-conviction relief upon some future, unforeseen development in the law. **Appellate courts are already overburdened with meritless and frivolous cases and contentions, and an effective appellate lawyer does not dilute meritorious claims with frivolous ones. Lawyers representing appellants should be encouraged to limit their contentions on appeal at least to those which may be legitimately regarded as debatable.** In a criminal case, of course, a convicted defendant's lawyer must present any contention his client wishes him to present, but he may do that without a representation of his own endorsement. A very novel constitutional claim is unlikely to spring from such a client.
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> *Wainwright v. Sykes,* 433 U.S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977), stated that the cause and prejudice exception was intended to provide for the adjudication of a claim which, in the absence of such adjudication, would result in a miscarriage of justice. In an absolute sense, no one can say that there was a miscarriage of justice in this case, for the jurors may have believed the prosecution witnesses beyond all reasonable doubt. On the other hand, no one can say that the verdict was not reached because the jurors placed the burden of persuasion upon the defendant rather than upon the state, just as they were instructed. Because the burdens of persuasion of his two defenses were placed upon him, Ross did not receive a fair trial. Such major unfairness in a trial is itself a miscarriage of justice. (Emphasis added).

Shamy, *Ingber*, and *Ross* recognize that where existing case law supports the elements of a particular crime or some aspect of criminal procedure, a criminal defendant should not be required to raise on appeal some argument attacking that established point of law to avoid being procedurally barred in the future when a new rule of law is recognized in a subsequent decision. As noted by the District Court in its two decisions, there was ample case law in the Fourth Circuit and in all other jurisdictions supporting honest services wire fraud convictions. The chances that this substantial body of law was going to be altered on appeal was rendered even slimmer by the fact that 18 U.S.C. §1346, was enacted by Congress in response to the holding in *McNally*.

On appeal, Petitioner chose not to raise a constitutional challenge to the validity of the honest services wire fraud conviction because, based upon the existing law, Petitioner's counsel was convinced the securities fraud conviction could not be separated from the wire fraud conviction, and he was convinced the securities fraud conviction would be set aside, which it was.

As a practical matter, had Petitioner raised this vagueness issue in his appeal to the Fourth Circuit, his honest services wire fraud conviction still would have been affirmed because, as observed by the District Court in its pretrial decision, "Courts have convicted defendants for depriving government of honest services for hundreds of years." 837 F.Supp. at 171. The Fourth Circuit's decision in *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995), further demonstrates this argument would have been rejected, even if it had been raised. As the Fourth Circuit explained, after citing several pre-*McNally* cases supporting honest services convictions, "While these authorities pre-date *McNally*'s invalidation of the `honest services' theory, we do not question their general applicability, now that the `honest services' proscription has been codified in 18 U.S.C. §1346." 58 F.3d at 942.

Rather than cite any of the foregoing case law, the United States particularly relies upon *United States v. Osser*, 864 F.2d 1056 (3rd Cir. 1988), for the proposition that a coram nobis petition can be procedurally defaulted where the petitioner fails to raise the underlying issue on appeal. In

Osser, the petitioner had been convicted of several counts of mail fraud, one count of conspiracy to commit mail fraud, and one count of obstruction of justice. Following *McNally*, Mr. Osser filed a petition for writ of coram nobis, seeking to have his mail fraud convictions set aside. There were several significant reasons why relief was denied in Mr. Osser's case.

First, Mr. Osser was convicted of multiple counts of mail fraud, based upon several theories, including an allegation that he received kickbacks and bribes. Thus, his mail fraud conviction could be sustained on theories other than the failure to provide honest services. In the present case, Petitioner was convicted exclusively of honest services wire fraud. The United States does not dispute there was no evidence presented at trial of any bribes or kickbacks involving Petitioner. Therefore, on this point, *Osser* is not applicable.

Second, unlike Petitioner, Mr. Osser failed to preserve the *McNally* issue at trial or on appeal. In the present case, Petitioner moved prior to trial to dismiss the honest services wire fraud count because it was unconstitutionally vague, which argument was rejected by the District Court in *United States v. ReBrook*, 837 F.Supp. 162 (S.D.W.Va. 1993), and reaffirmed in *United States v. ReBrook*, 842 F.Supp. 891 (S.D.W.Va. 1994).

Petitioner respectfully submits *Hoffman*, *Mathis*, *Shamy*, *Ingber*, and *Ross* provide ample authority for this Court to address the merits of Petitioner's claim for coram nobis relief due to the inherent unfairness in permitting an invalid honest services wire fraud conviction against Petitioner, from which Petitioner continues to suffer adverse effects, to stand.

III.

Petitioner's wire fraud conviction was affirmed by the Fourth Circuit only based upon the United States' honest services theory

The United States claims the jury in this case was presented with two theories of wire fraud–one, based upon the honest services theory, and two, based upon a property theory. An examination of the instructions given to the jury, the District Court's decisions, and the Fourth Circuit's decision clearly demonstrates Petitioner was convicted only of honest services wire fraud.

In *ReBrook*, 837 F.Supp. at 170, the United States gave the following summary of its honest services wire fraud theory:

> The Government contends Defendant's duty of honest service arose from: (1) his ethical responsibilities as an attorney for the Lottery; (2) his obligations under the Ethics Act; and (3) his inherent responsibilities as a West Virginia public employee. To support the validity of the indictment, the Court need only find at least one of these duties existed, so that the allegations asserted by the Government properly accuse Defendant of violating a fiduciary duty to his employer.

There is no discussion in this decision suggesting in any way that the United States, in addition to the honest services wire fraud theory, also was asserting a "property" theory of wire fraud against Petitioner.

In the underlying criminal trial, the jury was given instructions on honest services wire fraud and securities fraud, consistent with the two counts contained in the indictment returned against Petitioner. (Attached under Tab 1 is the portion of the trial transcript containing the jury instructions). After generally describing the elements of wire fraud and explaining what "transmits by wire or telephone communication in interstate commerce" means, the District Court gave the following instruction:

> I've used the term "scheme and artifice." And as that is used in the wire fraud statute, that would include any plan or course of action intended to deceive others and to obtain by false or fraudulent pretenses money or property from the person or entity so deceived. For the purpose of the wire fraud statute, the term"scheme or artifice

> to defraud" includes also a scheme or artifice to deprive another of the intangible right of honest services. While it may be properly charged under the wire fraud statute that a scheme violates or has as one of its goals the violation of some particular duty or duties imposed by state law as it is alleged here, it is not necessary that the scheme be one which violates a particular state statute or regulation or that it have as its goal something which is a crime in common law. Rather for the purpose of the wire fraud statute, any scheme involving deception that employs wire communication in its execution that is contrary to public policy and conflicts with accepted standard of moral uprightness, fundamental honesty, fair play and right dealing, may constitute a scheme or artifice to defraud. (Tab 1, at 588-89).

There is no discussion in the instructions suggesting in any way that the United States, in addition to the honest services wire fraud theory, also was asserting a "property" theory of wire fraud against Petitioner.

In *United States v. ReBrook*, 842 F.Supp. 891, 894 (S.D.W.Va. 1994), the District Court denied Petitioner's post-trial motions and concluded, with respect to the honest services wire fraud conviction:

> Defendant asserts the Court erred in allowing the government to establish wire fraud by alleging Defendant devised a scheme to defraud West Virginians of their "intangible right to honest services," 18 U.S.C. §1346, because the concept is unconstitutionally vague. The Court's instructions contained a specific and extensive definition of the type of "scheme or artifice to defraud" which violates the "intangible right of honest services" under §1346.
>
> The Court concludes the concept of the duty of honest services sufficiently conveys warning of the proscribed conduct when measured in terms of common understanding and practice.

There is no discussion in this decision suggesting in any way that the United States, in addition to the honest services wire fraud theory, also was asserting a "property" theory of wire fraud against Petitioner.

In *United States v. ReBrook*, 58 F.3d 961, 966 (4th Cir. 1995), the Fourth Circuit gave the following summary of the honest services wire fraud charges filed against Petitioner:

> In order to convict ReBrook for wire fraud in violation of 18 U.S.C.A. §1343 (West Supp. 1995), the Government must prove: "1) a scheme to defraud and 2) the use of a wire communication in furtherance of that scheme." *United States v. Brandon*, 50 F.3d 464, 467 (7th Cir. 1995). Additionally, under 18 U.S.C. §1346 (1988), "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." In this case, the Government alleged that ReBrook schemed to defraud the citizens of the State of West Virginia of his honest and faithful services as the attorney for the Lottery Commission, and that he traded on confidential information. (Footnotes omitted).

There is no discussion in this decision suggesting in any way that the United States, in addition to the honest services wire fraud theory, also was asserting a "property" theory of wire fraud against Petitioner.

The first time the United States suggested that it also had prosecuted Petitioner on a property theory of wire fraud was in the brief filed on October 7, 2010, in response to Petitioner's coram nobis petition. In coram nobis cases, it is not unusual for the United States to attempt to negate this remedy by trying to rewrite history and assert the conviction can be based upon another legally valid theory. For example, in *Mandel*, 862 F.2d at 1075, the United States sought to have the convictions sustained, despite the incorrect *McNally* instruction given to the jury:

> The government urges that society's interest in the finality of criminal convictions requires us to look beyond the improper instructions to the record to determine if adequate evidence of criminal activity existed on which to base a convictions under post-*McNally* standards. **In essence, the government asks this court to review the evidence and decide what a jury would or might have found if the instructions had been proper, or, to put it more bluntly, it asks us to convict the defendants of crimes with which they were not charged. This we decline to do.** The sufficiency of the evidence in a case is a question in each instance to be submitted to a jury, subject

> only to being set aside for insufficiency....We are not organized to decide if the petitioners are bad men or even if they have committed crimes. Our function is to decide whether or not, under the law, they are guilty of the crimes as charged in the indictment, and we decide that they are not. (Emphasis added).

Similarly, in the present case, the Court should reject this attempt by the United States to analyze this case based upon a theory that never was asserted at trial or argued on appeal to the Fourth Circuit.

The United States asserts the facts in this case are very similar to the facts in *Boatwright v. United States*, 779 F. Supp. 383 (D.C.Md. 1991). In *Boatwright*, the defendants had been convicted under two different theories of wire fraud–receiving kickbacks or money from their church as well as well as denying honest services to the church. In the present case, there was no evidence of Petitioner being involved in any kickbacks or bribes. The United States has never suggested either in the underlying trial, the Fourth Circuit briefs on appeal, or in its latest response that there was any evidence of kickbacks or bribes involving Petitioner. Thus, *Boatwright* has no application to this case.

Amazingly, the final argument made by the United States is that the jury's decision to convict Petitioner on the securities fraud count somehow proves the jury's decision to convict Petitioner on honest services wire fraud also was based upon a property theory. The jury never was instructed on a property theory of wire fraud, the District Court never addressed any property wire fraud theory in any of its orders, and the Fourth Circuit only affirmed the honest services wire fraud conviction. Furthermore, to state the obvious again, the Fourth Circuit vacated the securities fraud conviction as a matter of law. Therefore, the securities fraud count never should have gone to the jury in the first place. Petitioner respectfully submits the securities fraud conviction is totally irrelevant to the issues raised in this coram nobis proceeding, which challenges the validity of the honest services wire fraud conviction based upon *Skilling*.

IV.

Conclusion

The change in the law established by *Skilling* brings into question all previous mail and wire fraud convictions based upon the honest services theory, unless there was evidence of kickbacks or bribes. As applied in this case, *Skilling* establishes that although Petitioner is a convicted felon, he is actually innocent of wire fraud because the acts which formed the basis for his conviction cannot support it. Petitioner respectfully submits the foregoing case law supports and justice requires the granting of coram nobis relief sought in this case.

WILLIAM EDWARD REBROOK III, Petitioner,

–By Counsel–

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Respondent.

Certificate of Service

I, Lonnie C. Simmons, do hereby certify that on October 20, 2010, a copy of the foregoing **PETITIONER'S REPLY BRIEF IN OPPOSITION TO UNITED STATES' RESPONSE** was electronically served on the United States Attorney's office, to the following:

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